

§ 701.26 Exemption (b)(4).

Those containing trade secrets or commercial or financial information that a naval activity receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information, impair the government's ability to obtain necessary information in the future, or impair some other legitimate government interest. Examples include:

(a) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged such as trade secrets, inventions and discoveries, or other proprietary data.

(b) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

(c) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

(d) Financial data provided in confidence by private employers in connection with local wage surveys used to fix and adjust pay schedules applicable to the prevailing wage rate for employees within the Department of the Navy.

(e) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

(f) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, or developed in part with federal funds and in part at private expense, where the contractor or subcontractor retains a legitimate proprietary interest in the

data under 10 U.S.C. 2320-2321 and DOD Federal Acquisition Regulation Supplement (DFARS), subpart 27.4. Technical data developed exclusively with federal funds may be withheld under exemption (b)(3) if it meets the criteria of 10 U.S.C. 130.

(g) Computer software which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

Note: The status of unit prices in awarded in government contracts, once a controversial issue, has become more settled with recent court decisions. The courts have held that disclosure of unit prices would not directly reveal confidential proprietary information, such as a company's overhead, profit rates, or multiplier, and that the possibility of competitive harm was thus too speculative.

§ 701.27 Exemption (b)(5).

Those records containing internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decision-making process of an agency, whether between agencies or between Department of Defense and Department of the Navy components, except as provided in § 701.27 number (b) through (e). Also exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege.

(a) Examples include:

(1) Nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions, or suggestions.

(2) Advice, suggestions, or evaluations prepared on behalf of Department of the Navy individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups formed for the purpose of obtaining advice and recommendations.

(3) Nonfactual portions of evaluations by Department of the Navy personnel of contractors and their products.

(4) Information of a speculative, tentative, or evaluative nature on proposed plans to procure, lease, or otherwise acquire and dispose of materials, real estate, facilities, or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions.

(5) Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interests.

(6) Records that are exchanged among agency personnel and between Department of the Navy, Department of Defense, or other agencies in preparation for anticipated administrative proceeding by an agency or litigation before any federal, state, or military court, as well as records that qualify for the attorney-client privilege.

(7) Portions of official reports of inspection, reports of the Inspector General, audits, investigations, or surveys pertaining to safety, security, of the internal management, administration, or operation of one or more naval activities, when these records have traditionally been treated by courts as privileged against disclosure in litigation.

(8) Computer software meeting the standards of § 701.3(b)(3) which is deliberative in nature, the disclosure of which would inhibit or chill the decision making process. In that situation, the use of software must be closely examined to ensure its deliberative nature.

(9) Planning, programming, and budgetary information which is involved in the defense planning and resource allocation process.

(b) If any such intra- or interagency record or reasonably segregable portion of such record would be made available routinely through the "discovery process" (the legal process by which litigants obtain information from each other relevant to the issues in a trial or hearing) in the course of litigation with Department of the Navy, such record, should not be withheld even though discovery has not been sought in actual litigation. If, the information could only be made available through

the discovery process by special order of the court based on the needs of a litigant balanced against the interests of the Department of the Navy in maintaining its confidentiality, the record or document need not be made available under this instruction. Consult with legal counsel to determine whether exemption (b)(5) material would be routinely made available through the discovery process.

(c) Intra- or interagency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely available through "discovery" and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(d) A direction or order from a superior to a subordinate contained in internal communication cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

(e) An internal communication on a decision subsequently made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

§ 701.28 Exemption (b)(6).

Information in personnel and medical files, and similar files, that if disclosed to the requester would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act (PA) system of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties.

(a) Examples of files other than personnel and medical files containing similar personal information include:

(1) Those compiled to evaluate or adjudicate the suitability of candidates